Report of the Committee on Marriage and Divorce

WITH

SECOND TENTATIVE DRAFTS OF ACTS

ON THE SUBJECTS OF

Marriages and Licenses to Marry

AND

Family Desertion and Non-Support

PREPARED UNDER THE DIRECTION

OF THE

COMMISSIONERS OF UNIFORM STATE LAWS
IN NATIONAL CONFERENCE

AND

CIRCULATED FOR CRITICISMS AND SUGGESTIONS

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INTRODUCTION.

The Conference of Commissioners on Uniform State Laws is composed of Commissioners appointed by the Governors of the several States, sometimes by virtue of an Act of their Legislatures and sometimes without such Act.

Annual meetings of the Conference are held a few days before the meeting of the American Bar Association. Their object is to prepare drafts of Acts to bring about uniformity in State legislation on such subjects as properly come within the scope of their appointment. Nineteen annual conferences have been held. The next Conference will be held in the United States District Court room, Chattanooga, Tennessee, on Thursday, August 25, 1910, at 10 o'clock a. m.

The movement for uniformity of legislation originated in 1890 in the American Bar Association. Now there are Commissioners from forty-one States and Territories, as well as from Porto Rico and the Philippine Islands. None of the Commissioners receive any compensation for their work.

The following Acts have been drafted under their supervision, viz., the Negotiable Instruments Act, which has been adopted in thirty-eight States and Territories, including the District of Columbia and Hawaii ; the Warehouse Receipts Act, in nineteen States and Territories ; the Stock Transfer Act, in two States ; the Bill of Lading Act, in two States; the Uniform Divorce Act, in three States.

It is proper to remark that the last two Com-

mercial Acts have been before the public but one year, during which but few of the States held legislative sessions.

Although the attention of the Conference has been principally concentrated in recent years on subjects of commercial importance, the subjects of Marriages and Licenses to Marry and Desertion and Non-Support have received special consideration, as will appear from a reading of the following report.

WALTER GEORGE SMITH,
President.

Philadelphia, Pa., August 1, 1910.

REPORT OF THE COMMITTEE ON MARRIAGE AND DIVORCE.

To the Conference of Commissioners on Uniform State Laws:

The Committee on Marriage and Divorce respectfully reports:

At the last meeting of the Conference a tentative draft of an Act relating to Family Desertion and Non-Support was reported, and after consideration it was referred back to this Committee with certain suggested amendments for further consideration. Similar action was taken with regard to the tentative Act on the subject of Marriages and Licenses to Marry.

The new Committee has given consideration to both the Acts and has caused new drafts to be prepared, with such modifications as were found necessary or desirable in the light of the discussions of the Conference and suggestions from competent critics. Meetings of the Committee have been held in Washington in January, in Philadelphia in May, and in Cape May in June, when consideration was given to each of the Acts by those members of the Committee who were able to attend in person and other members by correspondence. Some differences of opinion were developed in regard to both of the Acts. It was finally concluded to report them in their present form with the understand-

ing, however, that each member of the Committee reserves to himself the right to support, oppose, or modify any of the provisions as his final judgment might dictate.

The Committee has been materially aided in its labors by William H. Baldwin, Esq., of Washington, who appeared before it in person and submitted carefully prepared suggestions and criticisms. William D. Crocker, Esq., of Williamsport, Pa., whose services were of so much value to the Committee last year, by authority of the Executive Committee was appointed its special Secretary and has carefully annotated both the Acts proposed, redrafting and enlarging the notes heretofore made, and adding new ones.

In the absence of the Chairman of the Committee, who was abroad for several months, the President of the Conference acted as Chairman pro tem.

It is confidently believed that the work of the Committee is now in such form as to make it susceptible of completion by the Conference with very little change.

All of which is respectfully submitted.

Edward W. Frost,
J. R. Thornton,
Seneca N. Taylor,
F. L. Siddons,
Robert Snodgrass,
John R. Emeery,
Ernst Freund,
Committee.

I.

AN ACT

Relating to and Regulating Marriage and Marriage Licenses; and to promote Uniformity between the States in reference thereto.

[Defining the essential elements of a marriage contract; prescribing the manner of contracting marriages, requiring the consent of parents or guardians of minors; requiring a marriage license in all cases; providing for the issuance thereof, the recording thereof, the form thereof, and the form, delivery and recording of the certificate of marriage; imposing penalties for solemnizing marriages without a license, or without authority of law, for refusing to return or record the certificate of marriage, for refusal or neglect by any marriage license clerk of the duties prescribed by this Act; providing that a certified copy of the record shall be prima facie evidence of any marriage; prohibiting common law marriages; providing for the legitimation of children by ex post facto marriages; requiring returns by marriage license clerks to the..... ..... of this State; fixing the fees of marriage license clerks; and repealing, consolidating and extending existing laws in relation to these subjects. (1)]

1. The Constitutions of all the States excepting the New England States, North Carolina and Mississippi, contain the following provision: "No Bill shall contain more than one subject which shall be (clearly) expressed in its title." Some of the States omit the word "clearly." The purpose of such provision is to prevent the joining together of several

independent and incongruous subjects, or matters, of which the title gives no intimation. Such provisions do not, however, prohibit the Legislature from adopting by a single Act a code or compilation of laws. Therefore, if the title fairly indicates the general subjects of the Act, is comprehensive enough to cover all the provisions thereof, and is not calculated to mislead either the Legislature or the public, it is sufficient. It would seem, then, that the general title above given, to wit, "An Act Relating to and Regulating Marriage and Marriage Licenses," is sufficiently indicative of all the provisions of this Act. With one exception, namely, the Section relating to the legitimising of children by ex post facto marriage. If it be decided that such provisions are not germane or cognate to the phrase "Relating to and regulating marriage," then the title to the Act would pro tanto be defective. Therefore, it has been thought better for purposes of discussion to bring to the attention of the Committee by way of enumeration of the various provisions of the Act the specific subject matter of each Section or group of Sections. If the general title alone be adopted, there would be the possibility of objection that it did not sufficiently indicate the intention of the Act to deal with the question of legitimacy and illegitimacy of children; but if such purpose be expressed in the foregoing synopsis of the provisions of the Act, then the only objection to the Sections relating to legitimacy or illegitimacy of children would be that they were not germane or cognate to the subject of marriage. Such an objection is more easily answered than would be an objection to the indefiniteness of the title. The question of sufficiency or insufficiency of title is fully discussed in 26 Amer. and Eng. Encyc. (2nd Ed.), pages 572-590.

Since the object of the Commissioners on Uniform Laws is to formulate and present a Bill that will tend to uniformity between the States, it seems desirable, in those States where a general title is sufficient, to add at the end of line 1 the words "and to promote uniformity between the States in reference thereto." These same words can be added at the end of the longer title if such longer form be desired.

Section 1. Be it enacted, etc., That marriage may be validly contracted in this State only after a license has been issued therefor, in the manner following:

1. Before any person authorized by the laws of this State to celebrate marriages (1) (and hereinafter designated as the officiating person), by declaring in the presence of at least two (2) competent (3) witnesses other than such officiating person, that they take each other as husband and wife, (4) or

2. In accordance with the customs, rules and regulations of any Religious Society, Denomination or Sect to which either of the parties may belong, (5) by declaring in the presence of at least two competent witnesses, that they take each other as husband and wife (5).

1. Clause 1 of Section II as printed on page 36 of the report of the Committee at Detroit was stricken out at the meeting of the Committee at Washington, it being deemed wiser to employ the general phrase "By or before any person authorized, etc."; thus leaving to each State the qualifications of the persons who may celebrate the marriage ceremony.

2. The number of witnesses required varies in different States. Varying from one to three. The Committee at Washington adopted the majority rule of two.

3. The report of the Committee as printed required "adult" witnesses. The Committee at Washington substituted the word "competent," being of the opinion that minors were as competent as parties sui juris.

4. A large majority of the States which have legislated upon the subject of mode or form of ceremony, require as an essential to the marriage contract that the parties shall "declare in the presence of witnesses that they take each other as husband and wife."

5. Thirty-seven States provide for marriage ceremonies according to the customs, rules and regulations of Quakers, Jews, and other religious societies. The Committee at Washington, therefore, directed the insertion of a Clause 2 of Section I to cover such ceremonies, which are in a sense merely marriage contracts in the presence of witnesses, without being performed by or before an officiating person. One of the chief purposes of this Act being the procuring of a license in proper legal form, and the registration of said license, it is, of course, immaterial whether the marriage ceremony be performed by a minister or civil official or in the presence of the proper number of witnesses in conformity with the rules and regulations of the proper religious society.

6. Just as under Clause 1 there should be two competent witnesses, so also should there be under Clause 2.

Section II. No persons shall be joined in marriage within this State until a license shall have been obtained for that purpose from the.....

.....(1) of the County where the marriage ceremony is to be performed.

1. The official title of the person whose duty it is to issue marriage licenses to be inserted here. The practice varies in the different States; in New England it is generally the town clerk, in New York it is the town or city clerk, who makes return to the county clerk; in the rest of the Middle States, and almost universally in the South and West, the license is issued either by the county clerk, or the clerk of the probate court, or the probate judge, and sometimes by the County Judge. Prof. Howard, in Vol. III, 193-4, recommends very strongly the division of every County into marriage districts, for each of which a Registrar should be authorized to license, solemnize and register all marriages civilly contracted therein, and to license, attend and register all religious celebrations; the authority of such Registrar to be restricted to his district, and each district Registrar to report to the County Registrar, and each County Registrar, in turn to the State Registrar. This system seems admirable for its theoretical simplicity, but the popular objection to the multiplication of officers would undoubtedly prevent its adoption.

Section III. Application for a marriage license must be made at least five days before the license shall be issued; provided that in cases of emergency, or extraordinary circumstances, the Judge of the Court having Probate Jurisdiction may authorize the license to be issued at any time before the expiration of said five days (1).

2. Wisconsin seems to be the only State requiring the license to be taken out several days before the marriage. In Maine "notice of intention" to apply for a license must be made at least five days before the issuing of the license, and provision is made for filing the protest against the issuing of a license. But if the license is once issued, the marriage ceremony may be performed at once. In Maryland no license is required if banns are published on three several Sundays before the marriage. In Ohio a license is not required if banns are published at least ten days before marriage. But as the custom of publishing of banns survives in so few States, it seems preferable to adopt the Wisconsin phraseology. The requirements of a previous notice of an intended marriage obtains very generally in Europe. In England and Wales a marriage can be celebrated only after the publication of banns, or by virtue of a license, general or special, or by virtue of a Registrar's Certificate.

In Scotland a regular marriage must be preceded by the publication of banns or the issuance of a Registrar's Certificate.

On the continent nearly every Country requires publication as a pre-requisite to marriage. This may be either by banns as in Austria, or by civil publication:—In Switzerland, for instance, either by notice posted in public places or by a single insertion in the official newspaper. The term of publication, whether by banns or by the civil authorities, varies from three weeks to two weeks.

It is apparent, therefore, that in Europe previous notice of intention of marriage by the publication of banns by the religious authorities or an application to the civil authorities several days in advance of the issuing of the license, is the mode adopted to secure notice to the public and prevent hasty and unlawful marriages. As stated above, this method obtains in only three States. In forty States the license issues immediately on the making of the application in proper form. In theory the European method is perhaps more desirable as preventing violation of the time period between the issuing of the license and the marriage, and also as affording an opportunity for the orderly presentation and disposition of any objections that may be raised by reason of impediments.

Section IV. No license shall be issued unless both of the contracting parties shall be identified to the satisfaction of the....., who shall further require of the parties, either separately or together, a statement under oath relative to the legality of the contemplated marriage, the date of same, the names, relationship, if any, age, nationality, color, residence, and occupation of the parties, the names of the parents, guardians, or curators of such as are under the age of legal majority, any prior marriage or marriages of the parties, or either of them, the manner of the dissolution thereof, and if there be no legal objection thereto, such .....shall issue a Marriage License in the form hereinafter prescribed. Or, the parties intending marriage may, either separately or together, appear before any....., magistrate, alderman, or justice of the peace of the County

(whether in this or any other State) wherein either of the contracting parties resides, or of the County where the marriage is to be performed, who shall require of them a statement under oath as above provided; and such statement, having been duly subscribed and sworn to, and the parties having been duly identified, shall be forwarded to the ..... of the County where the marriage is to be performed, who, if satisfied after an examination thereof, that the same is in proper legal form, and that no legal objection to the contemplated marriage exists, shall issue a license therefor. (1)

1. The terms of this Section follow, in substance, the Pennsylvania Acts of Assembly, and each State may change the phraseology. But the two essential features of the Section are, first, that no license shall be issued until proper proof has been made before the Marriage License Clerk, and second, that, as marriages are to be encouraged rather than prohibited, the requirement that the parties shall appear in person before the Marriage License Clerk is modified so as to permit the same proofs to be made before some official residing outside of the county seat. This latter provision may be peculiar to Pennsylvania, but it works very well in practice, since the record of the license and of the marriage ceremony is just as fully provided for by the subsequent Sections of the Act. The second paragraph of this Section also provides for a case where one of the parties, say the woman, resides in this State, and the other resides in another State, but cannot spare the time to appear in person before the Marriage License Clerk five days before the intended ceremony of marriage. Under this Section he can make the necessary proofs in advance before some magistrate of his place of residence.

A few States forbid the issuing of a license to imbeciles, paupers' epileptics, or persons afflicted with a transmissible disease. But as the determination of such facts would require expert testimony before the Marriage License Clerk, and as the interval of five days between the application for and the issuing of the license gives opportunity to relatives and friends to object to the marriage, it is thought hardly necessary to insert such restrictions in this Act.

Section V. No license shall be issued if either or both of the contracting parties be under the

marriageable age of consent as established by law. If either or both of the contracting parties be between the marriageable age of consent as established by law and the age of legal majority, to wit, between .....years and.....years, if a male, and between .....years and .....years if a female, no license shall be issued without the consent of his or her parents, guardian, or curator, or of the parent having the actual care, custody and control of such minor or minors, given before the ..... under oath, or certified under the hand of such parents, guardian or curator as aforesaid, and properly verified by affidavit before a Notary Public or other official authorized by law to take affidavits, which certificate shall be filed of record in the office of said ..... and entered by him on the Marriage License Docket before issuing said license; (1) Provided, that if there be no guardian or curator of either or both of such minors, or if there be no person having the actual care, custody, and control of such minor or minors, then the Judge of the County of the residence of the minor having Probate Jurisdiction may, after hearing, upon proper cause shown, make an order allowing the marriage of such minor or minors. (2)

1. At Common Law the ages of 14 and 12 years for male and female respectively, were the ages at which either might enter into a binding contract of marriage. Thirty States, including the District of Columbia, have by statute prescribed a higher age limit for marriageable consent, and in those States the marriage of a minor between the Common Law age of consent and the statutory age of consent is voidable by the minor on arriving at the statutory age of consent. See Beggs vs. State, 55 Ala., 108; Eliot vs. Eliot (Wisc.), 46 N. W., 806; State vs. Cone (Mich.), 57 N. W., 50; Scott vs. Lowell (Minn.), 80 N. W., 877.

In Minnesota and Wisconsin the statutory age of consent is fixed at 18 for the male and 15 for the female, but the statute does not declare that marriages under such ages shall be void, therefore the courts have held them to be voidable only. In the remaining 17 States the ages of consent remain the same as at Common Law. Three of those States, Kentucky, Louisiana and Virginia, having adopted said ages by statute.

Every State except South Carolina requires the consent of parents, etc., for the marriage of minors above the marriageable age of consent and under a given age. In 40 States that age is fixed at 21 for the male. In 3 States at 18, and in one State at 16. In the 2 remaining States, Georgia, and Michigan, no age is fixed for the parental consent for the male. But as in Georgia the statutory age of consent for the male is 17, and in Michigan 18, parental consent is apparently not considered necessary in those States, although required for the female up to the age of 18. The age below which parental consent is required for the marriage of the female is fixed at 21 in 9 States, at 18 in 34 States (including D. C.), and at 16 in 3 States.

"The age of legal majority" of the male corresponds with the age below which parental consent must be obtained in 40 States as above mentioned. If this phrase be retained in the text, then the remaining 6 States would be required to repeal their existing provisions. In a few States the age of 18 is made by statute the age of legal majority of the female. In the rest it remains 21. For the sake of uniformity, it is desirable that 21 be fixed as the age below which parental consent must be obtained for the female as well as for the male; but the Section has been worded so as to permit those States which have made 18 the legal age of majority for the female to retain such age.

2. A few States, notably Massachusetts, have a provision authorizing the court of proper jurisdiction to make an order allowing the marriage of minors, where the parents, or one of them, lives out of the State, or has deserted his family, or where the parents being dead, no guardian or curator has been appointed. Inasmuch, however, as the text of this Section uses the phrase "parent having the legal care, custody or control of such minors," it would seem as though the case of absent parents was sufficiently provided for, and that there is no need to invoke the consent of the court except where, the parents being dead, no guardian, or curator has been appointed. In many States a guardian *ad litem* would be appointed.

Section VI. Immediately upon entering an application for a license, the ..... shall post in his office a notice giving the names and residences of the parties applying therefor, and the date of the application. Any person believing that

the statements of the application are false or insufficient, or that the applicants or either of them are incompetent to marry, may file with the Court having Probate Jurisdiction in the County in which the license is applied for, a petition under oath setting forth the grounds of objection to the marriage, and asking for a rule upon the parties making such application to show cause why the license should not be refused. (1) Whereupon, said Court, if satisfied that the grounds of objection are prima facie valid, shall issue a rule to show cause as aforesaid, returnable as the Court may direct, but not more than 10 days from and after the date of said rule. If, upon hearing, the objections be sustained, the Court shall make an order refusing the license, the costs to rest in the discretion of the Court; but if the objections be over-ruled, the party or parties filing the same shall be liable for all costs of the proceedings.

1. Only two States, Louisiana and Maine, appear to have any provision for the filing of objections, by parents, guardians or others, to a contemplated marriage. In Louisiana the license issues immediately upon the making of the application. In Maine notice of intention to apply for a license must be made at least five days before the issuing of the license. The procedure in either of those States, in case of opposition to the marriage, is rather crude. The Committee at Washington having recommended that the license be taken out at least three days before the date of the marriage, it was further recommended that provision be made for the public posting of a notice of the issuing of the license, and for the filing of a protest by parents, guardians or others, with the proper court of the County in which the license was issued, and for a hearing upon such protest after notice to the parties interested. The Committee at its Cape May meeting adopted the plan of requiring the application to be made five days before the issuing of the license, and the notice to be posted differs accordingly.

2. The question of liability for costs where the license is revoked should depend upon the circumstances of each case. The party at fault might be the intended husband, possibly the wife, possibly a pretended parent or guardian. As in a sense the public is a party interested, the

costs, if small, might justly be imposed upon the County; on the other hand, if much testimony were taken, the County should not be liable. It is therefore suggested that the costs in such cases be left in the discretion of the Court.

Cases might arise where either liquidated damages, or unliquidated damages as to reputation, etc., might be suffered by the parties to the intended marriage, but it is very doubtful whether such damages should be recognized in this Section, because creating a new statutory cause of action sounding in tort. Therefore the parties are left to recovery of their costs.

QUAERE. Does this Section in any wise offend against constitutional provisions forbidding special legislation regulating the practice or jurisdiction of courts? It would seem not, since the Act applies to all proceedings of this character in every County in the State.

Section VII. Any person who shall, in any affidavit or statement required or provided for by Sections IV, V and VI of this Act, wilfully and falsely swear or who shall procure another to wilfully and falsely swear in regard to any material fact relating to the competency of either or both of the parties applying for a Marriage License, or as to the ages of such parties, if minors, or who shall falsely pretend to be the parent, guardian or curator, having authority to give consent to the marriage of such minors, shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine of not less than .....or more than .....dollars, or by imprisonment in the County Jail for not more than one year, or by both such fine and imprisonment. (1)

1. Colorado, Illinois, Massachusetts, Michigan, New York and Utah make such false swearing a penal offense. In Colorado, Michigan, New Jersey, New York and Utah it is perjury and punishable as such. The Illinois phraseology defining the punishment in the Section creating the offense seem preferable.

Section VIII. Any.....who shall knowingly issue a Marriage License contrary to or in violation of the provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine of not less than $100.00 or more than $500.00, or imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

1. Some eighteen States impose severe penalties upon Marriage License Clerks who issue licenses contrary to the provisions or the prohibitions of the statute. Nine of these use, in substance, the language of the text. Three impose a penalty only for issuing to persons incompetent to marry. Four States impose a penalty only for issuing a license to minors without parental consent. Two other States for issuing a license without an affidavit to the facts required to be stated in the application. All of these acts of misfeasance or non-feasance are of serious importance and should be severely punished, since the functions of the Marriage License Clerk are at least quasi-judicial, and it is very proper that a severe penalty should be imposed to insure a careful exercise of such powers. In addition to the foregoing acts, there may be also clerical mistakes of a less serious nature;—e. g.,a license may be granted by the Clerk of the wrong County, either through oversight of the law, or through collusion; or the Clerk may himself be ignorant of the provisions of the law as to consanguinity or affinity or other impediments to marry; or he may be careless in identification of the parties or in filling out the blanks in the application or in omitting to attach his seal, etc., etc. For such clerical mistakes perhaps a smaller penalty should be imposed. If so, it is suggested that such end can be obtained by reducing the minimum fine, rather than by introducing a separate Section covering clerical mistakes only, for the following reasons: First, in the case of the more serious offenses, the error can be corrected by protest filed within the five days elapsing between the making of the application and the issuing of the license. Second, a majority of the States have statutory provisions in one form or another to the effect that marriages consumated in good faith by the parties, and otherwise legal, shall be valid notwithstanding the fact that the license may have been issued by the wrong Marriage Clerk or that certain formalities have not been complied with. Provision is made for these matters in a subsequent Section. It is to be remembered that if any of the parties to the application for the license make false representations to the Marriage License Clerk, upon the strength of which he issues a license, they are, by Section VII, *supra*, made liable to a severe penalty. The amount of fine in this Section is fixed at the same amount as in said Section VII. As to whether marriages based upon false representations made by the parties themselves, should be treated as void or voidable is a question requiring careful consideration.

Section IX. Model forms for blank applications, statements, consent of parents, affidavits, licenses, and marriage certificates and such other forms as shall be necessary to comply with the provisions of this Act shall be prescribed by..... .....at the expense of the State; and a sample copy of each of said forms shall be furnished to the ..... of each County of the State. The County Officials shall furnish, at the cost of said County, to the..... ..... all of the aforesaid blanks, together with a suitable book to be called the Marriage License Docket, which said .....shall keep in his office among his records and enter therein a complete record of the applications for and the issuing of all Marriage Licenses, and of all matters which he is required by this Act to ascertain relative to the rights of any person to obtain a license. Said Marriage License Docket shall be open for public inspection or examination at all times during office hours. (1)

1. The foregoing Section needs no explanation.

Section IX of the Detroit Bill relating to inspection by the public also made it lawful for any person to make a copy or abstract of the entries contained in the Marriage License Docket for the purpose of publication. This provision was taken from the Pennsylvania Act of May 22, 1895, P. B. 99, which Act was passed because of a decision by one of the Common Pleas Courts of Penna., in re Marriage License Docket, 4 Dist. Rep, 284, holding that since the earlier Marriage License Act of June 23, 1885, did not direct publication of any kind in regard to the intention of marriage, it did not confer upon persons without special interest the right to inspect the Marriage Records, and therefore that a newspaper reporter had no right to such inspection. The argument of the Court was, that in the absence of statutory directions the Marriage License was not a public record in the sense that it is open to the public to inspect and copy therefrom as a matter of right. This seems a narrow interpretation, and yet the authorities cited in the opinion of the Court, seem to sustain the posi-

tion there taken. But since by the foregoing Section it is provided that the Marriage License Docket shall be open for public inspection, it would seem unnecessary to add a provision legalizing publication of the facts there appearing.

Section X. The license shall authorize the marriage ceremony to be performed only in the County in which the license is issued. (1) The license shall be directed "to any person authorized by the laws of this State to solemnize marriages," and shall authorize him to solemnize marriages between the parties therein named, at any time not more than one year (2) from and after the date thereof. If the marriage is to be solemnized by the parties without the presence of an officiating person, as provided by paragraph two of Section one of this Act, the license shall be directed to the parties to the marriage. If either of the parties be not of the age of legal majority, then his or her age shall be stated, and the fact of the consent of his or her parents, guardian or curator shall likewise be stated; and if either of said parties shall have been theretofore married, then the number of times he or she shall have been previously married and the manner in which the prior marriage or marriages was or were dissolved shall be stated. The officiating person shall satisfy himself that the parties presenting themselves to be married by him are the parties named in the license; and if he knows of any legal impediment to such marriage, he shall refuse to perform the ceremony. (3) The issue of a license shall not be deemed to remove or dispense with any legal disability, impediment or prohibition

rendering marriage between the parties illegal, and the license shall contain a statement to that effect. (4)

1. In some States, e. g., Pennsylvania, the license issued authorizes the marriage ceremony to be performed in any County of the State. This provision was adopted in Section XII of the printed Bill, but the Committee at Washington decided to confine the place of ceremony to the County where the license should be issued, see Section II, *supra*.

2. North Carolina and Wisconsin seem to be the only States fixing a time limit to the Marriage License, but there is much to be said in its favor. In Austria the life of a Marriage License is six months, in England three months; in Germany six months; and in Switzerland six months.

3. These provisions also are necessary for the protection of the officiating person.

4. This last clause appears in no existing statute, but has been suggested by a member of the Committee. Being declaratory of the existing law, there may be no objection to its adoption.

Section XI. Said license shall be in form substantially as follows:

State of .....
County of ..... } ss. No. .....

To any person authorized by the laws of this State to solemnize marriage:

You are hereby authorized at any time not more than one year from and after the date hereof, within the County of ..... (not knowing any legal impediment thereto) (1) to join together in marriage in accordance with the laws of this State A ..... B .....aged ..... and never heretofore married, (or married on the ..... day of ....., A. D. ....., to E ..... F ....., said E ..... F ..... having died on the ..... day of .....A. D.

.....; or, said A..... ...B..... ..... having been divorced from said E.....F..... by the Court of .....of the County of .... State of .....on the .....day of .... A. D. .....,) and C..... ..... D.....aged ..... and never heretofore married, (or married on the..... ..... day of..... ..... A. D....., to G ....H ..... said G ..... H .... having died on the .....day of..... A. D..... ..... ; or said C..... ..... D .....having been divorced from said G .....H ....by the Court of.....of the County of..... ..... State of..... .... on the..... .....day of ....A. D. .....). The consent of..... ..... the.....of the said A ....B..... and of....., the .....of the said C..... ....D .... having been duly given. The issue of this license shall not be deemed to remove or dispense with any legal disability, impediment or prohibition rendering marriage between the parties illegal. (2)

Given under my hand and the seal of the ....Court of ..... at..... ..... State of .... this .... day of .... Anno Domini one thousand nine hundred and..... [Seal] ....

Marriage License Clerk.

1. This clause in parenthesis appears in the New York form of license and seems to be a very proper warning to the officiating person as to impediments to the marriage within his knowledge.

2. As stated in note 4 of Section XI this is novel provision. But it is a very proper notice where the license is issued to the parties them-

selves in case there be no officiating person, and for the sake of uniformity should be included in the more general form of license.

The foregoing form of license has been filled out in detail for the purpose of showing in concrete form the requirements of Section X. The form of license issued in most States is quite brief. In Pennsylvania it consists merely of the first five lines ending with the words "the laws of this State," and omitting the two clauses in parenthesis, following which are several blank lines for filling in the names of the parties, of the parents or guardians of minors, the fact of former marriage if any, mode of dissolution, and cause of divorce, if any, according to the facts of each particular case. It is deemed worth while to submit for the consideration of the Committee a full form of the license.

Section XII. If the marriage is to be solemnized by the parties without an officiating person, as provided by paragraph 2 of Section I of this Act, the license shall be in form substantially as follows:

State of .....
County of ..... } ss. No. .....

To A ..... B ..... aged .....
and C. ..... D ..... aged .....

This is to certify that legal evidence having been furnished to me as required by law, and the consent of ..... the ..... of the said A ..... B ..... and of ..... the ..... of the said C. ..... D ..... having been duly given, I am satisfied there is no legal impediment to your joining yourselves in marriage in accordance with the customs, rules, and regulations of the Religious Society, Denomination or Sect to which you, or either of you, may belong, at any time not more than one year from and after the date hereof, within the County of .....

The issue of this license shall not be deemed to remove or dispense with any legal disability, impediment or prohibition rendering marriage between you illegal.

Given under my hand and the seal of the..... ..... Court of .... at..... ..... State of .... this .... day of ..... . Anno Domini one thousand nine hundred and.....

.....

[Seal] Marriage License Clerk.

Section XIII. The license shall have appended to it three certificates numbered to correspond with the license, (one marked "original," one marked "duplicate," and one marked "triplicate,") which shall be in form substantially as follows:

MARRIAGE CERTIFICATE.

I,..... hereby certify that on the .....day of.....Anno Domini one thousand nine hundred and ....at..... ..... in the County of..... .....State of..... A..... B ..... of .... State of.....and C..... ..... D ..... of.....State of.....were by me united in marriage as authorized by a Marriage License issued for that purpose by the..... .....of.....County and State of.....numbered.....and dated the .....day of .....A. D. 19..... ....

Signed .....

Minister of the Gospel, Justice of the Peace, or.....

We, the undersigned were present at the marriage of A.....B..... and C..... D....., as set forth in the foregoing certificate, at their request, and heard their declarations that they took each other for husband and wife.

D ..... E .....
F ..... G .....

But if, as provided by Section XII of this Act, the license has been issued to the parties themselves, then the certificate (in triplicate) shall be in form substantially as follows.

MARRIAGE CERTIFICATE.

We hereby certify that on the.....day of ..... Anno Domini one thousand nine hundred and .....we united ourselves in marriage in accordance with the customs, rules and regulations of the ..... (1) at ..... in the County of ..... and State of..... .....having first obtained from the ....of the County of .....State of ....., a Marriage License numbered .....and dated the.....day of .....A. D. 19 ....., certifying that he was satisfied that there was no legal impediment to our so doing.

A ..... B .....
C ..... D .....

We, the undersigned were present at the marriage of A..... B..... and C..... D....., as set forth in the foregoing certificate, at their request, and heard their declar-

ations that they took each other as husband and wife.

D..... E.....
F..... G.....

1. This blank to be filled in with the name of the Religious Society to which the parties or either of them may belong, to wit, Jews, Quakers, Anabaptists, etc., as the case may be.

Section XIV. The Marriage Certificates marked "original" and "duplicate," duly signed, shall be given by the officiating person to the persons married by him; and the certificate marked "triplicate" shall be returned by such officiating person, or, in the case of a marriage ceremony performed without an officiating person, then by the parties to the marriage contract, or either of them, to the .....who issued the license, within thirty days after the date of said marriage. (1)

1. The Maine, Massachusetts, and New Hampshire statutes have the following provisions. "If a marriage be solemnized in another State between parties living in this commonwealth, who return to dwell here, they shall, within seven days after their return, file with the clerk or registrar of the city or town in which either of them lived at the time of their marriage, a certificate or declaration of their marriage, including the facts relative to marriage which are required by law, and for neglect thereof shall forfeit ten dollars."

Unquestionably, complete registration of all marriages is greatly to be desired. But such a provision as the foregoing has been omitted from this draft because it would seem impractical in the present day and generation, when, owing to the demands of business and ease of transportation, hundreds and thousands of families are constantly on the move, to enforce such a provision. However, any State whose present code contains such a clause may readily reinsert it, the question being really a matter of local concern.

Section XV. The said .....upon receiving such triplicate certificate, shall immediately enter the same on the Docket where the Marriage License

of said parties is recorded, and place such certificate on file.

Section XVI. If any officiating person shall solemnize a marriage unless the contracting parties shall first have obtained a proper license as hereinbefore provided; or unless the parties to such marriage declare that they take each other as busband and wife; or without the presence of two competent witnesses; or in the case of a minor or minors, unless the consent as hereinbefore provided of the parent, guardian or curator of such minor or minors be stated in such license; or shall solemnize a marriage knowing of any legal (1) impediment thereto; or shall solemnize a marriage more than one year from and after the date of the license; or shall falsely certify to the date of a marriage solemnized by him; or shall solemnize a marriage in a County other than the County in which the license was issued—he shall forfeit and pay a sum not exceeding $500.00 to and for the use of the County in which the license was issued, or, in case of no license, of the County in which the marriage was solemnized. (2)

1. The offense here is confined to knowledge of *legal* impediments. Violation of a Church Canon forbidding the re-marriage of divorced persons would be an ecclesiastical and not a legal offense, therefore, the qualifying adjective "legal" is necessary.

2. All of these offenses are of a serious nature, and should be severely punished. As, however, they are offenses against the public and not against the parties themselves, a penalty in the sum named, for the use of the County concerned, will perhaps be as efficacious as to make the offense a misdemeanor punishable by fine or imprisonment, because more certain of being enforced.

MEM. Some ten States require either that Ministers of the Gospel be licensed by some authority within the State, or that they have

an active charge within the State, or that they be residents of the State, thus practically forbidding a marriage ceremony to be performed by a clergyman of another State. This is a matter for each State to regulate for itself. This Act does not pretend to define the persons who shall be authorized to solemnize marriages, or their qualifications.

Section XVII. Where a marriage is solemnized without the presence of an officiating person, then, and in that case, if the parties to such marriage shall solemnize the same more than one year from and after the date of the lieense; or shall falsely certify to the date date of such marriage; or shall solemnize the same in a County other than the County in which the license was issued, they or either of them shall forfeit and pay a sum not exceeding $500.00 to and for the use of the County in which the license was issued. (1)

1. The prohibitions of this Section are formal rather than substantive, and a marriage solemnized in violation thereof would not, and should not, be rendered void by reason of such violation.

Section XVIII. If any person, not being duly authorized by the laws of this State, shall undertake to solemnize a marriage in this State, he shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than $100.00 or more than $1000.00, or by imprisonment in the County Jail for not more than one year, or by both such fine and imprisonment. (1)

1. This being a serious offense against both public policy and the parties to the marriage, the penalty should be severe.

Section XIX. Every officiating person, or persons marrying without the presence of an officiating person as provided by paragraph 2 of Section I of

this Act, who shall neglect or refuse to transmit the triplicate certificate of any marriage solemnized by him or them, to the.....issuing the license within thirty days after the date of such marriage, shall forfeit and pay the sum of one hundred dollars for the use of the County in which the Marriage License was issued.

Section XX. Any.....who shall refuse or neglect to enter upon the Marriage License Docket a complete record of each application and of each Marriage License issued from his office, upon or immediately after the same shall have been made or issued, as the case may be, or to enter the triplicate certificate of any marriage upon the Marriage License Docket as required by Section XV of this Act, or shall fail to keep such Marriage License Docket open for inspection or examination by the public, or shall prohibit or prevent any person from making a copy or abstract of the entries in the Marriage License Docket, shall for each such illegal act, omission or denial, forfeit and pay the sum of fifty dollars for the use of the County in which the Marriage License was issued.

Section XXI. Any fine or forfeiture accruing to any County under the provisions of this Act may be recovered by an action of debt in the name of said County, in the same manner as other debts are recovered by law, with the usual costs, in any court of record in any County in this State in which the defendant or defendants may be found.

Section XXII. A copy of the record of the Marriage License, and Marriage Certificate, certified under the hand of said..... and the seal of the court, shall be received in all courts of this State as *prima facie* evidence of such marriage between the parties therein named. (1)

1. The purpose of this Section is simply to provide that certified copies of the Marriage License and Certificate may be received in evidence as *prima facie* proof of a marriage in lieu of the originals themselves. A number of the States have statutory provisions similar to this which are generally found in their "Marriage" codes and not in their "Evidence" codes.

Section XXIII. All marriages hereafter contracted in violation of any of the requirements of Section I of this Act (1) shall be null and void (except as provided in Sections XXIV and XXV of this Act) and the issue thereof illegitimate; Provided that the parties to any such void marriage may at any time validate such marriage by complying with the requirements of this Act, and the issue thereof, if any, shall thereupon become legitimate, as provided by Section XXVIII of this Act.

1. The purpose of this Section is to abolish what are known as Common Law Marriages, which end can best be effected by declaring such marriages void, as has already been done in some twelve or thirteen States. In as many more there are provisions requiring a license, proper solemnization of the marriage, and consent of the parents, etc., of minors. But the Courts of those States have construed such requirements as directory only and not mandatory, because of the absence of language declaring marriages performed in violation thereof void.

The requirements of this Act may be divided into two classes: first those which on grounds of public policy may be considered as substantive, affecting the validity of the marriages, the observance of which should be strictly insisted upon, and any violation thereof, being necessarily wilful on the part of the contracting parties, should be severely punished; second, those which may arise from no fault of the parties themselves but be due to fraud or carelessness of others, and may therefore be regarded as merely formal. Of the first class are those requiring

(a) the issue of a license; (b) that the marriage be solemnized before an officiating person duly authorized by law, or according to the rites and ceremonies of any Religious Society or Denomination to which either of the parties may belong; (c) the declaration by the parties that they take each other as husband and wife; (d) the presence of at least two competent witnesses. Of the second class are those relating to (a) the jurisdiction of the Marriage License Clerk; (b) to omissions, informalities or irregularities of form, either in the application for the license or in the license itself; (c) to incompetency of the witnesses to the marriage; (d) to the solemnization of a marriage in a County other than that in which the license was issued; (e) to false assumption of authority or jurisdiction of the officiating person, whether wilful or innocent; (f) that the marriage shall not be solemnized more than one year after the date of the license; (g) and, in the case of minors, requiring the consent of the parents, guardian or curator of such minor before issuing a license.

For violation of the first class of requirements the marriage itself should be declared void as provided by this Section. For violation of the second class of requirements it is sufficient that in addition to the penalties imposed upon the offending party such marriages should be regarded as voidable only, as the divorce laws of each State may provide. As to such laws, it is sufficient to say that such marriages can be annulled only upon the ground of fraud, force or coercion, at the suit of the innocent and injured party; and not even then if the marriage has been confirmed by the acts of such injured party after knowledge of the facts.

Section XXIV. No marriage hereafter contracted shall be void by reason of want of authority or jurisdiction in the officiating person solemnizing such marriage, if the marriage is in other respects lawful and is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage, If only one of the parties was ignorant of such want of authority, the marriage shall be voidable by such party, if proceedings to annul the same shall be brought within one year after such want of authority has come to his or her knowledge. (1)

I. The last clause of this section introduces a cause of annulment that does not appear in the Uniform Divorce Bill, nor, indeed, in the

Divorce Laws of any State, unless such cause be included within the general provision relating to marriages obtained by "fraud, force or coercion."

Section XXV. No marriage hereafter contracted shall be void either by reason of the license having been issued without the consent of the parents, guardian or curator of a minor, or by a .... not having jurisdiction to issue the same, or by reason of any omission, informality or irregularity of form in the application for the license or in the license itself, or by reason of the incompetency of the witnesses to such marriage, or because the marriage may have been solemnized in a County other than the County in which the license was issued, or more than one year after the date of the license, if the marriage is in other respects lawful and is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

1. The exceptions specified in the last two Sections embody the suggestions of the Committee at its meeting at Washington to the effect that marriage contracted in good faith by the parties should not be invalid by reason of mere formalities, etc., or because solemnized before an officiating person unlawfully assuming authority or jurisdiction to solemnize the marriage. Many States have similar provisions. The exceptions contained in these Sections are thought to cover every necessary provision of this character.

Section XXVI. A marriage contracted by a person requiring the consent of a parent, guardian, or curator, without such consent, shall be voidable upon the application of such person, or of the parent, guardian, or curator of such person; but no such application shall be made after the party requiring consent has reached the age of legal

majority and has voluntarily cohabited with the other party, nor in any event more than one year after such party has reached the age of legal majority. If the application is made by the parent, guardian or curator, the Court may refuse to grant the same, if such refusal shall appear to be to the interest of the party who required the consent, and such party does not join in the application. Any Court having jurisdiction to grant divorces shall have power to annul a marriage as provided by this section. (1)

1. While this section introduces into the Marriage Code a ground of annulment that does not appear in the Uniform Divorce Bill adopted by the Conference of Commissioners, yet it seems to be a very proper protection of minors who may have been inveigled into a marriage without full understanding of the importance of such step. Such cause of annulment being created, it is of course necessary to confer jurisdiction upon the courts to annul such marriages.

Section XXVII. If a person during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract in accordance with the provisions of Section I of this Act, and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, or that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of

such subsequent marriage shall be considered as the legitimate issue of both parents. (1)

1. This provision is copied from a similar provision in the Massachusetts Statutes, and possibly may be found in a few other States. The principle underlying this section is that of Estoppel. That is to say, such a marriage should not be voidable at the instance of the party at fault any more than the marriage of a minor who has freely cohabited after attaining his or her majority, or a marriage induced by fraud if the marriage has been confirmed by the innocent party after acquiring knowledge of the fraud.

Section XXVIII. In any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of lawful wedlock, in the manner prescribed by this act, such child or children shall thereby become legitimated, and enjoy all the rights and privileges of legitimacy as if they had been born during the wedlock of their parents; and this section shall be taken to apply to all cases prior to its date, as well as those subsequent thereto; Provided, That no estate already vested shall be divested by this Act.

1. This section is derived from two or three Acts of Assembly in force in Pennsylvania. Many other States have similar provisions. The language of this Section is intended to cover all of the principles involved in the question.

Section XXIX. The ..... of each County shall, on or before the first day of February in each year, make return to the ....of this State, upon suitable blank forms to be provided by the State, of a statement of all Marriage Licenses issued by him during the preceeding calendar year, including all the facts required to be ascertained by him upon the issuing of

each license; and shall also make return of a statement of all Marriage Certificates which shall have been returned to him during such period; and upon neglect or refusal so to do, such ....shall forfeit and pay the sum of one hundred dollars for the use of the proper County. (1)

1. Twenty-five States have made statutory provisions for State Registration of marriage. The United States Census Bureau has been at great expense, owing to the lack of State Registration, in its effort to secure accurate statistics concerning marriage and divorce in the United States, and all who are interested in this matter recognize the necessity of an adequate and uniform system of State Registration. Such Registration is simply the next step beyond the keeping of a record in the proper County of all licenses issued in that County; therefore, it is very properly the subject of a Marriage License Bill. The requirements of this Section correspond with the information asked for by the United States Census Bureau.

Section XXX. This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.

Section XXXI. Each Marriage License Clerk shall be entitled to receive the following fees. (1)

1. Each State to fix its own fees.

Section XXXI. Repealing clause.

Section XXXIII. This Act shall take effect the.....day of..... Anno Domini 19 .....

II.

AN ACT

Relating to Desertion and Non-Support of Wife or Children.

Section I.—Be it enacted, etc., (1)

That any person who shall, without just cause, desert or wilfully neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances; or any person who shall, without lawful excuse, (2) desert or wilfully neglect or refuse to provide for the support and maintenance of his or her legitimate or illegitimate (3) minor child or children under the age of sixteen years in destitute or necessitous circumstances, shall be guilty of a misdemeanor (4) and, on conviction thereof, shall be punished by fine not exceeding five hundred dollars, or imprisonment, not exceeding two years, (5) or both, with or without hard labor, in the discretion of the Court. (6) And it is hereby made the duty of the parent of any illegitimate child or children under the age of sixteen years to provide for the support and maintenance of such illegitimate child or children. (7)

1. This Act, throughout, follows very closely the Act of Congress of March 23rd, 1906, for the District of Columbia, the principles of which are very fully discussed in the monograph of William H. Baldwin, Esq., of the Board of Managers of the Associated Charities of Washington, D. C., entitled "Family Desertion and Non-Support Laws." Nearly every State has some provision relating to this subject. The Acts of Assembly in many States are quite full and comprehensive. The Act adopted by Congress for the District of Columbia was the result of correspondence by the Board of Associated Charities of Washington, with Governors, Attorneys-General, District Attorneys, and prominent lawyers of many States. This Act of

Congress works very satisfactorily in the District of Columbia. At the meeting of the Committee in Washington in January, 1910, Mr. Baldwin was present, and greatly assisted the Committee with advice and suggestions and information as to the practical workings of the Act in the District of Columbia.

Acts of Congress differ very much from Acts of Assembly of the various States, in that they are much more concise, and generally embrace, by way of proviso, matters that the legislatures of the various States are inclined to express in separate sections. Each mode of expression has its advantages. But, in view of the fact that the courts of each separate State are so often called upon to determine the constitutionality of various parts of Acts of Assembly, and since one part of an Act may be sustained as constitutional, and another part rejected as unconstitutional, it seems preferable for State legislatures to divide every Act into separate and distinct sections. Therefore, the provisions of Section I of the District of Columbia Act have been divided into several sections.

2. It will be observed that in line 1, "wife desertion" must be "without just cause," whereas in line 5 "child desertion" must be "without lawful excuse." The reason for the distinction is this : Wife desertion is a cause of divorce as well, and in divorce proceedings such desertion must have been "without just cause" on the part of the *deserted* wife. But in the case of child desertion there must be a "lawful excuse" on the part of the *deserting* parent. In other words, in the first instance the ground justifying the desertion must be furnished or occasioned by the deserted party. In the second instance the excuse or ground for desertion must be furnished by the deserting party.

3. The inclusion of illegitimate as well as legitimate children was omitted from the District of Columbia Act, but is strongly recommended by Mr. Baldwin and approved by the Committee. Nebraska and Ohio seem to be the only States whose Desertion Laws apply to illegitimate as well as legitimate children. A bill is now pending in Congress to bring illegitimate children within the provisions of the District of Columbia Act.

4. "Family Desertion," according to the tables prepared by Mr. Baldwin, is made a felony in five States—namely, Michigan, Nebraska, New York, Ohio, and Wisconsin; a misdeameanor in forty States, including the District of Columbia; while in five States there is no law on the subject—to wit, in Iowa, Nevada, Oregon, Tennessee and Texas. Some States, like Pennsylvania, treat Family Desertion in two ways, either as a quasi-criminal offense as under the Act of April 13, 1867, P. L. 78, where the offender is haled before the court of Quarter Sessions on information made before a Justice of the Peace or other Magistrate, and after hearing, without a jury, the Court may order him to pay a certain sum for the support and maintenance of his wife or children; or as a misdemeanor, as under the Act of March 13, 1903, P. L. 26. Under this latter Act, which is cumulative, the offender is entitled to trial by jury. The

penalty is imprisonment or fine, or both; the fine if any, to be paid or applied in whole or in part to the wife or children, as the court may direct. In Pennsylvania a civil remedy is also granted to the wife against the husband by the Act of April 27, 1909, P. L. 182. Such civil remedy obtains in many other States.

As pointed out by Mr. Baldwin in his study on "Family Desertion and Non-Support," it is very essential that the offense of desertion and non-support be raised to the grade of a crime, in order that it may become an extraditable offense, as many instances occur where the husband removes to another State, leaving his family helpless and destitute. But as forty States and Territories have made it a misdemeanor, and since under the Act of Congress of February 12th, 1793, any person charged with the commission of a felony *or other crime*, is subject to extradition, it seems advisable to make the offense a misdemeanor rather than a felony. In one State at least, South Carolina, and probably others, a misdemeanor is not punishable by confinement at hard labor.

5. Unless there is a constitutional provision in any State limiting the term of imprisonment for a misdemeanor to one year or less, this clause "not exceeding two years" is clearly within the power of the Legislature. The Committee, when at Washington, adopted by way of amendment to Section IV. of the printed report, now Section IV, the words "for a period not exceeding two years," but omitted to make a similar amendment to Section I. This clause is therefore added that Sections I and IV may correspond. While "twelve months" is the maximum term of imprisonment fixed by the District of Columbia Act, it has been found in practice that it often becomes necessary to begin proceedings *de novo* at the end of the first year. It was therefore thought best to increase the time to two years.

6. As stated above in Note 4, confinement at hard labor is never imposed in some States where the offense is only a misdemeanor. In other States the penalty "at hard labor" is not imposed except where the imprisonment is in the Penitentiary, or a Reformatory, or House of Correction. It rarely obtains where the imprisonment is in the County Jail; partly for the practical reason that in them there are neither appliances, nor space nor opportunities for what is actually known as "convict labor." But as the penalty provided in this Section reads, "with or without hard labor," the question will rest in the discretion of the court according to the penal provisions of the laws of each State. In some States "convict labor" has been either abolished or limited as the result of the influence of the Labor Unions.

In Maryland, at the Baltimore Penitentiary, "Contract Labor" is permitted by law Recent investigations show that the labor of the prisoners enures not only to the benefit of the State, but of the prisoners themselves, who by working overtime earn for themselves or for the support of their families, fully as much as goes to the State. In the District of Columbia, which is under control of Congress, and therefore in a sense, sui generis, prisoners at hard labor may be compelled to work upon the

streets of the City of Washington at a fixed wage per diem, and of their wages, under the Act of Congress of 1906, an amount equal to fifty cents a day is paid over to, or for the benefit of, the prisoner's family. It would be impracticable, perhaps, to insert a clause in this Bill providing for the employment of offenders under this Act upon the streets or highways of the several municipalities or counties of each State under the term "at hard labor." Nevertheless, it is evident that if such provision could be adopted by each State, it would relieve the public at large from the expense of supporting the families of such offenders. Such a provision is well worth the consideration of every State.

7. At Common Law no obligation rests upon a putative father to support his illegitimate child; yet nearly every State imposes a statutory liability upon such father by what are known as its Bastardy Laws This statutory liability can of course be enforced only to the extent and in the manner indicated by the statute, and it goes without saying, that the Legislature has the power to create and increase this liability by statute.

In perhaps a majority of the States proceedings under Bastardy Laws are considered in substance as civil suits. They are, however, often spoken of as quasi-criminal, and many courts have been inclined to treat them more as a criminal proceeding than otherwise; see "Cyc" Vol. 5, page 644. The object of Bastardy Proceedings, as well as of this Bill, *is to compel a father to provide for the support of his children*, and thus secure the public, as well as the mother, against such support. Non-support is the gravamen of this section; and since, as stated above, a statutory obligation must be imposed to render a father liable for the support of his illegitimate child, this last clause was added by the Committee at their meeting at Cape May. In proceedings under this Act just as under the Bastardy Acts, it will, of course, be necessary that the fatherhood of any child be proven by jury trial before sentence can be imposed. The remedy provided by this Act is cumulative, and not exclusive of Bastardy Proceedings. The chief difference lies in the fact that the penalty in Bastardy cases are more often a fine and order of support than imprisonment. But the character of the sentence rests in the discretion of the court, and there would seem to be no good reason why the father of an illegitimate child whose parentage has been proven should not *contribute to its support* just as much as the father of a legitimate child.

Prof. Ernst Freund (of the Committee) was strongly opposed in Committee to the advisability of placing illegitimate children within the purview of the Act, and reserved the right to object thereto in full Conference, the grounds of his objection being as follows.

a. "The problem of the desertion or non-support of wife and children is a specific one, and widely differs from the problem of the non-support of illegitimate children. Family desertion is the violation of an already established and acknowledged status relation, and as a rule indicates a special type of character; a man of shiftless or dissolute habits, who may at any time drift into vagrancy, one who may very properly be subjected

to measures of disciplinary control such as are contemplated by this bill. The person who refuses to support an illegitimate child, may be industrious and efficient, and his refusal may be simply due to doubts which he entetains as to his paternity, and which may be well justified. Moreover, he may owe a primary duty of support to his legitimate wife and children, which may be interfered with by the proceedings taken under the proposed bill. These proceedings may, in fact, be entirely unsuited to compulsory support of the illegitimate child by the reputed father.

b. "Nearly every State has statutes which provide for bastardy proceedings. For this reason all states that have enacted family desertion laws, have confined them to wife and legitimate children, with the exception of Ohio and Nebraska. Inquiries made in Chicago of persons competent to judge, confirm the opinion that it would be unwise to deal by one measure with the two widely disparate evils. The Attorney of the Legal Aid Society of Chicago writes: 'Any attempt to combine the two would, in my judgment, result only in confusion.' The Assistant County Attorney of Cook County, who has charge of the non-support cases arising in Chicago writes: 'I do not think it advisable the law should be changed, and do not see how it is possible to pass any law making it an offense for a reputed father to desert his illegitimate child.'

"These two gentlemen have a wide experience in non-support cases, and their judgment carries great weight.

c. "If the present bastardy laws are inadequate, their amendment should be separately considered. Bastardy legislation has had a history extending back to the colonial times, and to disturb the long settled policy of the states without very full consideration of the difficulties and problems involved looks very much like a leap in the dark. The present bill should be confined to the definite subject of family desertion, and not mixed up with entirely extraneous matters"

Section II. Proceedings under this Act may be instituted upon complaint made under oath or affirmation by the wife or child or children, or either of them, or by any other person or persons, or organization, against any person guilty of either of the above named offenses. (1)

(1) The provisions of this section formed part of Section II of the Desertion Bill as reported at Detroit in 1909. But said section was there stricken out because it defined the forum before which proceedings should be instituted. Upon further consideration by the Committee at Cape May, it was deemed necessary to re-adopt the provisions of this section as it now stands.

Section III.—(1) At any time before the trial, upon petition of the complainant and upon notice to the defendant the Court, or a Judge thereof in vacation, may enter such temporary order as may seem just, providing for support of the deserted wife or children, or both, *pendente lite*, and may punish for violation of such order as for contempt. (2)

1. Sections II and III of the printed Bill as reported at Detroit in August, 1909, were stricken out by the Committee at its meeting at Washington in January, 1910, for the reason that they related solely to matters of administrative procedure, the forms of which would necessarily vary in each State, and therefore it would be useless to attempt to hope for the adoption of a uniform clause which related to methods of procedure. The Committee therefore thought it better to omit these Sections and simply recommend by way of suggestion in a note, that the initial proceedings in all Desertion cases should be instituted before the court of lowest jurisdiction. In some States this is a Justice of the Peace, in others a Municipal Court, in others a County or District Court. The point to be borne in mind in this regard is that the remedy be as simple and speedy as possible.

2. This Section is in form the same as an amendment to Section IV of the printed Bill offered at Detroit by Mr. Noel, of Indiana, and was adopted by the Committee at its meeting in Washington. The purpose of the Section is plain; namely to provide for support for the family pending the beginning of the proceedings and the final order of the court. Where the proceedings are begun before a court of record, the application, of course, can be made at any time. Where the proceedings are begun before a Justice of the Peace, or other Magistrate, who must make his return to the court, it follows that the application under this Section cannot be made until such return has been filed with the Clerk of the Court. But that is a minor matter of procedure.

Section IV. Before the trial, with the consent of the defendant, or at the trial, on entry of a plea of guilty, or after conviction, instead of imposing the penalty hereinbefore provided, or in addition thereto, the court in its discretion, having regard to the circumstances, and to the financial ability or earning capacity of the defendant, shall have the power to make an order, which shall be subject to

change by the court from time to time, as circumstances may require, directing the defendant to pay a certain sum weekly, for a period not exceeding two years, (1) to the wife or to the guardian, curator or custodian of the said minor child or children, or to an organization or individual approved by the court as trustee; (2) and shall also have the power to release the defendant from custody on probation for the period so fixed, upon his or her entering into a recognizance, with or without surety, in such sum as the court or a Judge thereof in vacation, may order and approve. The condition of the recognizance shall be such that if the defendant shall make his or her personal appearance in court whenever ordered to do so, and shall farther comply with the terms of such order of support, or of any subsequent modification thereof, then such recognizance shall be void, otherwise of full force and effect. (3)

1. The term of one year in Section IV of the Bill as printed was changed by the Committee at Washington to read "not exceeding two years," for reasons stated in Note 5 to Section I.

Section I makes the offense of Desertion a crime, and prescribes the penalty; Section III secures support for the family by an order pendente lite; but as the main purpose of a Desertion Act is the protection and maintenance of the family, it is apparent that additional remedies are required. This Section endeavors to meet that need: a. By an order of support entered before trial with the consent of the defendant; b. By an order of support made if a plea of guilty be entered to the indictment; c. By an order of support made after conviction. All of these orders to be in lieu of, or in addition to the penalties prescribed by Section I.

3. This clause providing for release on probation is taken from the District of Columbia Act. The Desertion Acts of many States contain a similar provision which is found in practice to be very effective. The penalty of imprisonment, especially at hard labor, soon brings the wife deserter to a willingness to give surety for the support of his family, and a means is thus secured for enforcing the order of support authorized by the first paragraph of this Section.

Section V. If the court be satisfied by information and due proof under oath, that at any time during said period of two years the defendant has violated the term of such order, it may forthwith proceed with the trial of the defendant under the original charge, or sentence him or her under the original conviction, or enforce the suspended sentence, as the case may be. In case of forfeiture of recognizance, and enforcement thereof by execution, the sum recovered may, in the discretion of the court, be paid, in whole or in part, to the wife, or to the guardian, curator, custodian or trustee of the said minor child or children. (1)

1. This provision is taken from the District of Columbia Act which follows the Acts of Illinois, Louisiana and Virginia.

Section VI. No other or greater evidence shall be required to prove the marriage of such husband and wife, or that the defendant is the father or mother of such child or children, whether legitimate or illegitimate, than is or shall be required to prove such facts in a civil action. (1) In no prosecution under this Act shall any existing statute or rule (2) of law prohibiting the disclosure of confidential communications between husband and wife apply, (3) and both husband and wife shall be competent and compellable (4) witnesses to testify against each other (5) to any and all relevant matters, including the fact of such marriage and the parentage of such child or children; (6) Provided that neither shall be compelled to give evidence incriminating himself or herself. Proof of the desertion of such wife, child or children in destitute or necessitous cir-

cumstances or of neglect or refusal to provide for the support and maintenance of such wife, child or children shall be *prima facie* evidence that such desertion, neglect or refusal is wilful. (7)

1. While under the Constitution of the United States, and probably of each State, no defendant can be compelled to incriminate himself, yet both in criminal and civil actions the issue of legitimacy or illegitimacy of children is a matter of frequent occurrence. This clause relating to a proceeding where a wife or husband, necessarily by the fault of the other, is forced to protect life or reputation, as a stranger would, confines the character of the proof to such as would be required in a civil action.

2. Section VI *as formerly printed* refers simply to "existing provisions of law;"no change of this wording was made by the Committee at Washington. But the Secretary suggests that "existing provisions of law" might be construed as including only statutory provisions and as not being broad enough to include judicial utterances upon *The Rule of Law* relating to confidential communications. The phrase is therefore changed to read "Existing Statute or Rule of Law."

3. This clause relating to disclosure of confidential communications between husband and wife opens a field for wide discussion. Under the Common Law the fiction of unity of husband and wife, and the farther fiction forbidding parties in interest to testify either for or against each other long obtained. The latter fiction has been abolished in most States. The former fiction has been abolished in many States both in criminal and civil proceedings where—

(a) The consent of the other party is given at the trial; or (b) Where the marital relation has been so violated by the act of either as to abolish the reason for the rule. The Constitution of the United States provides that "no person can be compelled in any criminal case to be a witness against himself." The Constitutions of many States provide that no person can be compelled in any criminal case "to give evidence against himself." But these constitutional provisions do not apply to or limit the power of the State Legislatures to require the disclosure of confidential communications between husband and wife. The forbidding of such disclosures was the policy of the law; but if the confidential marital relation has been violated by the act of either party, the reason of the rule ceases. In such case the communications do not arise from the confidence of the parties in each other, but from the want thereof; and therefore even without statutory authority either party may testify to the same. Seitz vs. Seitz, 170 Pa., page 171.

4. An exception to the rule excluding testimony of husband and wife against each other is to be found in cases of personal outrage by one on the other.

30 Amer. and Eng. Cyc., page 954.

This exception being based on public policy it follows that the injured spouse is not only competent but is compellable to testify if unwilling.

30 Amer. and Eng. Cyc., page 955, Johnson vs. State 94 Ala. page 53; Turner vs. State, 60 Miss., page 351; S. C. 45 Amer. Rep. page 412; Bramlette vs State 21 Tex. App. page 611; see also "Cyc." pp. 961-2, (2)—(b); 46 Amer. Rep. page 241. In Pennsylvania, by the Act of May 23 1887, P. L. 158, Section 2, it is provided that in criminal cases neither husband nor wife shall be competent to testify against each other "except in proceedings for desertion and maintenance, and in any criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other; and also that neither shall "be competent or permitted to testify to confidential communications made by one to the other, unless this privilege be waived upon the trial." A similar provision will be found in the statutes of many States. It is therefore apparent that it lies in the power of the Legislatures of each State to abrogate the Common Law rule forbidding husband or wife to testify against each other, (whether in criminal or civil proceedings), and forbidding the disclosure of confidential communications. No constitutional prohibition is violated thereby.

There are two very strong reasons why a wife should be made a compellable as well as competent witness. First, because of possible duress or menace on the part of the husband. Second, because if the proceedings are begun by outsiders, she should, in the interests of the State, be compelled to testify. And if the wife is made compellable, there would seem to be no valid reason why the husband should not also, if the circumstances require.

5. In Section VI of the Detroit report the clause read, "testify to any and all relevant matters." At the meeting at Detroit in August, 1909, the words "against each other" were inserted after the word "testify." This amendment was adopted by the Committee at its meeting in Washington. The reasons for such amendment have been given in Notes (3) and (4) supra.

6. Since, as explained in Note 1, the first paragraph of this Section limits the proof of the parentage of children to the character of proof required in civil actions, it would seem that this last clause relating to" the fact of marriage and the parentage of any child or children," cannot be construed to compel either parent to incriminate himself or herself, but to avoid all doubt upon this point the Committee have thought it wiser to add the proviso.

7. Section VI of the Detroit Bill, included only the words "desertion" and "neglect," whereas Section I included the words "desert, neglect or refuse," The words "desert, neglect or refuse," are well established and generally adopted in statutes of this character; therefore, the Committee at Washington thought it better to adopt in this Section the same terminology as obtained in Section I.

Section VII. It shall be the duty of the sheriff, warden, or other official in charge of the County Jail, or of the custodian (1) of the Reformatory, Workhouse, or House of Correction, in which any person is confined on account of a sentence at hard labor, under this Act, to pay over to the wife, or to the guardian, curator or custodian of his or her minor child or children, or to an organization or individual approved by the court as trustee, at the end of each week, for the support of such wife, child or children, a sum equal to ..... for each day's hard labor performed by said person so confined. (2)

1. The term "custodian" is generic. In each State the proper title of the official in charge of the Reformatory, Workhouse, or House of Correction should, perhaps, be substituted.

2. This Section is copied from Section III of the District of Columbia Act with one or two verbal changes adopted by the Committee.

In order to carry out the provisions of this Section there must, of course, be additional legislation in each State specifically providing for "contract" or "convict" labor. And a fund provided, from which to draw for the purposes covered by this Section. As stated before, the District of Columbia is *sui generis* in this regard. Congress makes an annual appropriation to this end. In the District of Columbia, desertion offenders are put at "hard labor" upon the streets under "contract labor." The method there in vogue of treating desertion offenders is worthy of study and imitation by every State.